STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Mark T. Boonstra, P.J., Joel P. Hoekstra and Douglas B. Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

TIMOTHY WADE HORTON **No. 150815**
Defendant-Appellant.

L.C. No. 2013-247924-FH
COA No. 324071

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

MICHAEL WENDLING
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief, Research, Training, and Appeals

TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226
Phone: (313) 224-5792

Table of Contents

Index of Authorities

Federal Cases **Page**

State Cases

Other Authority

Statement of the Question

I.

Defendant rendered an unconditional plea of nolo contendere after proper advice of rights under the court rule, including advice of the *Boykin/Jaworski* trial rights defendant was waiving by pleading. A claim of speedy trial—which had been raised, and denied by the trial court—is rendered irrelevant by a plea, and there is nothing that suggests that defendant's counsel misadvised him that after his plea he *could* raise on appeal issues concerning matters arising before the plea. Is there a basis on which to find counsel was ineffective, or that defendant's plea was involuntary?

Amicus answers: "NO"

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

Defendant rendered an unconditional plea of nolo contendere after proper advice of rights under the court rule, including advice of the *Boykin/Jaworski* trial rights defendant was waiving by pleading. A claim of speedy trial—which had been raised, and denied by the trial court—is rendered irrelevant by a plea, and there is nothing that suggests that defendant's counsel misadvised him that after his plea he *could* raise on appeal issues concerning matters arising before the plea. There is no basis on which to find counsel was ineffective, or that defendant's plea was involuntary.

Introduction

This court has granted leave to appeal to the defendant, and directed that the following issues be briefed:

> (1) whether the defendant's unconditional no contest plea waived his claim of ineffective assistance of trial counsel based on trial counsel's failure to make a motion to dismiss for a 180-day rule violation, MCL 780.131 and 780.133, in light of *People v Lown*, 488 Mich 242, 267-270 (2011),[1] or for constitutional speedy trial violations;
>
> *Amicus answers yes, qualifiedly.*
>
> (2) whether the defendant's unconditional no contest plea waived his claim of ineffective assistance of trial counsel for trial counsel's failure to inform the defendant that an unconditional no contest plea would waive his right to appeal on the basis of a 180-day rule violation or constitutional speedy trial violations; and;
>
> *Amicus answers yes.*

[1] As defendant has pointed out in his brief, Defendant's Brief, at ii, 12, he was not an inmate of a state correctional facility during these proceedings, and there is no issue of "failure to make a motion to dismiss for a 180-day rule violation" under MCL 750.131 and MCL 750.133 in this case. Amicus will thus address only the effect of an unconditional plea of guilty on a possible claim of a violation of the constitutional speedy-trial right.

(3) whether trial counsel's failure to inform the defendant that his unconditional no contest plea would waive his right to appeal on the basis of a 180-day rule violation and constitutional speedy trial violation made defendant's plea unknowing and involuntary.

Amicus answers no.

A. An unconditional plea of no contest renders irrelevant claims of ineffective assistance concerning nonjurisdictional issues, and constitutional speedy trial issues are nonjurisdictional

1. *Tollett v. Henderson*: a plea renders irrelevant all nonjurisdictional issues

> "In *Tollett,* the Supreme Court held that a defendant who pleads guilty unconditionally waives all 'independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'"[2]
>
> "'[W]aiver was not the basic ingredient of this line of cases. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. . . . A guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.'"[3]

It has become a commonplace[4] that a valid plea of guilty "waives" all antecedent "nonjurisdictional" claims, including constitutional claims; a "jurisdictional" claim includes one concerning whether the Constitution "precluded the State from haling [the defendant] into court on

---

[2] *United States v. Gaffney*, 469 F.3d 211, 214 (CA 1, 2006).

[3] *Haring v. Prosise*, 462 U.S. 306, 321, 103 S. Ct. 2368, 2377, 76 L. Ed. 2d 595 (1983), quoting *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 242, n2, 46 L.Ed.2d 195 (1975) (emphasis in original).

[4] "We have assiduously followed the letter and spirit of *Tollett,* holding with monotonous regularity that an unconditional guilty plea effectuates a waiver of any and all independent non-jurisdictional lapses that may have marred the case's progress up to that point, thereby absolving any errors in the trial court's antecedent rulings (other than errors that implicate the court's jurisdiction)." *United States v. Cordero*, 42 F.3d 697, 699 (CA 1, 1994).

the charge to which he had pleaded guilty."[5] But though perhaps resistance is futile,[6] in point of fact the United States Supreme Court has not so held, and these cases thus somewhat mischaracterize the *Brady/McMann/Parker*[7] trilogy.

In *Brady v. United States*[8] the defendant was charged with kidnapping, facing a maximum possible penalty of death if the jury so recommended. When his codefendant pled guilty and agreed to testify against him, he pled guilty in avoidance of the death penalty. Later, the death-penalty provision of the statute was struck down, and Brady attacked his plea as induced by the unconstitutional statute. The Court disagreed, emphasizing that "the plea is more than an admission of past conduct; *it is the defendant's consent that judgment of conviction may be entered without a trial*—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the

---

[5] *Menna v. New York*, 96 S. Ct. at 242. The Supreme Court later made plain that even these claims must be resolvable *on the existing factual record*, so if not properly preserved will for that reason not be considered. *United States v. Broce*, 488 U.S. 563, 575, 109 S. Ct. 757, 765, 102 L. Ed. 2d 927 (1989) (In *Menna* the Court held that "'[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.' . . . We added, however, an important qualification: 'We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that-*judged on its face*-the charge is one which the State may not constitutionally prosecute'" (emphasis added by the Court)).

[6] *Star Trek: First Contact* (1996) (said by the Borg).

[7] The *Brady* trilogy is *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Parker v. North Carolina,* 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). See e.g. *United States v. Broce*, 488 U.S. 563, 573, 109 S. Ct. 757, 764, 102 L. Ed. 2d 927 (1989) referring to the "*Brady* trilogy."

[8] *Brady v. United States*, 397 U.S. 742, 744, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

relevant circumstances and likely consequences. On neither score was Brady's plea of guilty invalid."[9] Even if, said the Court, it were assumed that Brady would not have pleaded guilty but for the death-penalty provision of the statute, "[t]hat the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act." This circumstance is little different, the Court continued,

> from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.[10]

The claim in *McMann v. Richardson*[11] was that the pleas were induced by a prior involuntary confession. Citing *Brady*, the Court found that the claim was irrelevant to the conviction by plea. The claim, the Court said, was "at most a claim that the admissibility of his confession was

---

[9] *Brady v. United States*, 90 S. Ct. at 1468-1469 (emphasis supplied).

[10] *Brady v. United States*, 90 S. Ct. at 1468-1470.

[11] *McMann v. Richardson,* 397 U.S. 759, 760, 90 S. Ct. 1441, 1443, 25 L. Ed. 2d 763 (1970).

mistakenly assessed and that since he was erroneously advised, either under the then applicable law or under the law later announced, his plea was an unintelligent and voidable act. *The Constitution, however, does not render pleas of guilty so vulnerable*."[12] Rather, continued the Court, "a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases."[13] After all, "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts."[14]

Parker[15] is an analogue to both cases. There defendant claimed his plea was invalid because it was induced by a state statute providing a lower maximum penalty for those who pled guilty than those who were convicted at trial, and also because it was the product of an involuntary confession. Citing *Brady* and *McMann*—all three cases were decided the same day—the Court held that "*even if Parker's counsel was wrong* in his assessment of Parker's confession, it does not follow that his

---

[12] *McMann v. Richardson*, 90 S. Ct. at 1448 (emphasis added).

[13] *McMann v. Richardson*, 90 S. Ct. at 1448-1449.

[14] *McMann v. Richardson*, 90 S. Ct. at 1448 (emphasis added).

[15] *Parker v. North Carolina,* 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970).

error was sufficient to render the plea unintelligent and entitle Parker to disavow his admission in open court that he committed the offense with which he was charged. Based on the facts of record relating to Parker's confession and guilty plea, which we have previously detailed, we think the advice he received was well within the range of competence required of attorneys representing defendants in criminal case."[16]

The Supreme Court made clear subsequently on several occasions that these cases do *not* rest on any theory of waiver, which would bring into play the requirements of *Johnson v. Zerbst*[17] regarding the requirements for a waiver. In *Tollett v. Henderson*[18] defendant, who had pled guilty, alleged systematic invidious discrimination in the selection of jurors for grand jury service, and the State conceded the point. Defendant argued that he had not been informed of his right to an indictment from a grand jury free of invidious discrimination in its selection, and did not know when he pled that there had in fact been invidious discrimination in the selection of the grand jurors. Because of these facts, the Court of Appeals found that defendant had not, under the strictures of *Zerbst*, waived his constitutional grand-jury claim.

The Supreme Court reversed, saying that the Court of Appeals "took too restrictive a view of our holdings in the *Brady* trilogy," for "the Court in *Brady* and *Parker*, as well as in *McMann*, refused to address the merits of the claimed constitutional deprivations that occurred prior to the guilty plea. Instead, it concluded in each case that the issue was not the merits of these constitutional claims as such, but rather whether the guilty plea had been made intelligently and voluntarily with

---

[16] *Parker v. North Carolina*, 90 S.Ct. at 1462 (emphasis supplied).

[17] *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

[18] *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).

the advice of competent counsel."[19] The question was not one of waiver—if it was, the Court of Appeals was, the Court said, "undoubtedly correct" that there was none—rather, the guilty pleas "foreclose[d] direct inquiry into the merits of claimed antecedent constitutional violation[]."[20]

The *Brady* trilogy, then, that "did not rest on any principle of waiver. . . . Our decisions in *Tollett* and the cases that followed simply recognized that when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by an alleged [constitutional] violation because the conviction does not rest in any way on evidence that may have been improperly seized."[21] The Court has also said to this point that "waiver was not the basic ingredient of this line of cases. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. *A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt* and which do not stand in the way of conviction, if factual guilt is validly established."[22]

---

[19] *Tollett v. Henderson*, 93 S. Ct. at 1607.

[20] *Tollett v. Henderson*, 93 S. Ct. at 1607.

[21] *Haring v. Prosise*, 462 U.S. 306, 319-321, 103 S. Ct. 2368, 2376-2377, 76 L. Ed. 2d 595 (1983).

[22] *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 242, n2, 46 L.Ed.2d 195 (1975) (emphasis in original).

2. A claim of a speedy-trial violation is not a jurisdictional claim, and is rendered irrelevant by a plea of guilty or nolo contendere

If, then, a guilty plea—which includes, for these purposes, a plea of nolo contendere—renders irrelevant any alleged antecedent constitutional violations not logically inconsistent with the valid establishment of factual guilt, is a claim of that the right to speedy trial has been violated "inconsistent with the establishment of factual guilt," so as to be denominated "jurisdictional," or, put another way, is it a claim that the Constitution "precluded the State from haling [the defendant] into court on the charge to which he had pleaded guilty,"[23] as is a claim that jeopardy bars trial? It is not.

Defendant asks this Court to overrule those Court of Appeals cases holding that a speedy trial claim is not subject to litigation after a plea of guilty or nolo contendere as inconsistent with this Court's decision in *People v. New*,[24] arguing that it is "hard to imagine a legal issue that would directly 'implicate the very authority of the state to bring a defendant to trial' more so than the violation of a defendant's speedy trial rights."[25] But it is almost the unanimous view of those jurisdictions that have considered the question, including the federal circuits, that a claim that the

---

[23] *Menna v. New York*, 96 S. Ct. at 242. The Supreme Court later made plain that *even these* claims must be resolvable on the existing factual record, so if not properly preserved will for that reason not be considered. *United States v. Broce*, 488 U.S. 563, 575, 109 S. Ct. 757, 765, 102 L. Ed. 2d 927 (1989) (In *Menna* the Court held that "'[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.' . . . We added, however, an important qualification: 'We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that-*judged on its face*-the charge is one which the State may not constitutionally prosecute'" (emphasis added by the Court).

[24] *People v. New*, 427 Mich. 482 (1986).

[25] Defendant's Brief, p. 14.

right to a speedy trial has been violated is *not* a claim that defendant could not be "haled into court" on the charged offense and brought to trial, it is rather a claim that the process has moved too slowly. Cases are legion that a guilty plea renders a speedy trial claim irrelevant, though the cases often say that the plea "waives" any claim of a violation of speedy trial: "The guilty plea trilogy . . . stand[s] for the general rule that a guilty plea that is intelligently and voluntarily made, precludes later constitutional challenges to the pretrial proceedings. . . . The existence of such violations [including speedy trial] is consistent with guilt as a matter of fact. If guilt can be validly established such violations are not logically inconsistent therewith. While such violations preclude the establishment of guilt by trial, that is the extent of their reach. The establishment of guilt by a proper plea is not condemned by these protections. The Constitution protects the accused from conviction by trial but not a conviction by way of a plea of guilty. *Tollett* and the *Brady* trilogy control here. *Menna* is

inapplicable."[26] And a majority of *this* Court in *People v. Smith*[27] held that a guilty plea "waives"

---

[26] *United States v. O'Donnell*, 539 F.2d 1233, 1237 (CA 9, 1976), superceded on other grounds, as recognized by *United States v. Smith*, 60 F.3d 595 (CA 9, 1995). See also, for example, *Washington v. Sobina*, 475 F.3d 162 (CA 3, 2007) ("a speedy trial claim alleges that the inherent delay between arrest and conviction has risen to an unacceptable level, and as such the claim is not inconsistent with the 'establishment of factual guilt'"; "Accordingly, we agree with our sister courts that have concluded that the right to a speedy trial is non-jurisdictional, and is therefore waived by an unconditional and voluntary guilty plea. See *United States v. Coffin,* 76 F.3d 494, 496 (2d Cir.1996) (recognizing that because the right to a speedy trial is non-jurisdictional, a knowing and voluntary guilty plea waives a speedy trial claim unless the claim is specifically reserved for appeal); *Nelson v. Hargett,* 989 F.2d 847, 850 (5th Cir.1993) (holding that because all non-jurisdictional defects are waived upon entry of a guilty plea, defendant waived alleged violation of right to a speedy trial); *Cox v. Lockhart,* 970 F.2d 448, 453 (8th Cir.1992) (holding that defendant's knowing and voluntary guilty plea waived his right to a speedy trial); *O'Donnell,* 539 F.2d at 1237 (same); *United States v. Yunis,* 723 F.2d 795, 796 (11th Cir.1984) (holding that right to speedy trial is non-jurisdictional, and thus defendant's guilty plea foreclosed raising speedy trial claim on appeal)." See further, for example, *People v. Schneider*, 25 P.3d 755, 759 (Colo., 2001) ("A defendant entering a guilty plea waives the right to a speedy trial"); *Miller v. State*, 217 P.3d 793, 803 (Wyo., 2009) ("A claim of violation of the right to a speedy trial is a non-jurisdictional defense").

[27] In the "lead" opinion, for himself and only two other justices, Justices Mallett and Griffin, Justice Levin wrote that "The Court of Appeals agreed with the prosecutor that Smith's unconditional plea of guilty waived any claim she might otherwise assert that her constitutional right to a speedy trial was violated. Although this Court's order granting leave to appeal was without limitation, we are now persuaded that this issue should not be further reviewed by this Court." *People v. Smith*, 438 Mich. 715, 718-719 (1991) overruled on other grounds by *People v. Williams*, 475 Mich. 245 (2006). For these justices, then, the holding of the Court of Appeals regarding waiver of the constitutional right to speedy trial remained undisturbed. Justice Boyle, for herself and two other justices, Justice Griffin (again) and Riley, said "I agree with Justice Brickley's analysis and conclusion that an unconditional guilty plea waives a claim of violation of the federal and Michigan constitutional right to a speedy trial," observing that there exists a "clear rule that the constitutional speedy trial right is waived by a valid plea of guilty." *People v. Smith*, 438 Mich. at 719, 722. And Justice Brickley dissented, as while he would have found that the constitutional right to speedy trial is waived by a plea of guilty, he would not have so found with regard to the statutory so-called "180-day rule" regarding incarcerated inmates and pending charges. Thus, four justices said that the constitutional right to speedy trial is given up by a plea. See *People v. Depifanio*, 192 Mich. App. 257, 257 (1991) ("Defendant's sole argument on appeal is that he was denied his constitutional and statutory rights to a speedy trial. However, defendant tendered an unconditional plea of guilty, and an unconditional guilty plea waives a claim of violation of federal and Michigan constitutional rights to a speedy trial. . . . *People v. Smith,* 438 Mich. 715 (1991), (concurring opinion of Boyle, J., p. 719, and dissenting opinion of Brickley, J.,

any claim that the right to speedy trial was violated.[28] *People v. New*, which defendant argues compels the overruling of those cases holding that a speedy trial claim may not be litigated after a plea of guilty or nolo contendere, is in no way inconsistent with the approach of the cases cited by amicus. *New* held that after a guilty plea a defendant may not raise issues concerning the seizure of evidence, or whether the motion to quash the information was properly denied, citing the *Brady* guilty-plea trilogy from the United States Supreme Court. As the Court of Appeals has said, construing and applying *New*:

> At the time of defendant's arraignment in the instant case, the state unquestionably had a legitimate interest in securing a conviction. The "very authority of the state," *People v. New* . . . . The passage of time did not alter the state's interest or its initial authority to act. Although jurisdiction over the person of the defendant may have been lost, defendant's unconditional guilty pleas relinquished this nonjurisdictional defense which was unrelated to the "very authority" of the state to act in the first instance.
>
> The following language from the holding of *People v. New, supra,* implies that speedy trial rights are forfeited by a plea of guilty:
>
> > On the other hand, where the defense or right asserted by defendant relates solely to the capacity of the state

---

p. 730. . . ." (parallel citations omitted).

[28] A treatise provides examples of situations where a plea has been held not to constitute a waiver of the antecedent issue: "that the court lacked subject matter jurisdiction over the case, that the defendant had not waived grand jury indictment, that the indictment was illegally amended, that the plea was not to a charge included in the indictment or any lesser included offense, that the plea was to a charge that as a matter of fact or law merged with another offense of which defendant has been convicted, that the conviction violates double jeopardy, that the information was invalid, that the statute describing the charged offense was vague or overbroad or otherwise facially unconstitutional, that the Indian defendant could only be charged in tribal court, that the court lacked jurisdiction because of a defective transfer from juvenile court or nontransfer to juvenile court, that the statute of limitations had run, that the procedures for determining defendant's fitness were not followed, that the judge was not impartial, or that the sentence was unauthorized." LaFave, Israel, King, & Kerr, *5 Criminal Procedure (4th Ed.),* § 21.6(a).

> to prove defendant's factual guilt, it is subsumed by defendant's guilty plea. [*People v. New, supra,* p. 491, 398 N.W.2d 358.]
>
> As previously stated in *United States v. Gaertner* and *United States v. O'Donnell,* the purpose of speedy trial rights (both constitutional and statutory) is to assure that factual guilt is validly established.[29]

Defendant's unconditional plea here rendered any claim of a denial of speedy trial irrelevant.

B. Where the alleged deficient actions of defense counsel relate to issues that are waived—rendered irrelevant—by a valid unconditional guilty plea, the claim of ineffective assistance of counsel relating to those actions is also waived (rendered irrelevant), as defendant may only attack the performance of his counsel as it affects the voluntariness of his or her plea

1. Counsel performance and pleas

In *People v Vonins (After Remand)*[30] the defendant, as here, entered an unconditional plea. On appeal he claimed his counsel was ineffective for not pursuing an interlocutory appeal from the denial of the motion to quash, and for not obtaining an agreement for a conditional plea to preserve for appeal the denial of his motion to suppress. The Court of Appeals held that the defendant could not thereafter "circumvent his accurate, voluntary, and understanding unconditional guilty plea, which necessarily involves a waiver of such an error [regarding the ruling on the motion to suppress], by claiming that defense counsel was ineffective because he failed to appeal the trial court's denial of defendant's motion to suppress or to preserve the issue by obtaining a conditional plea. Where the alleged deficient actions of defense counsel relate to issues that are waived by a valid unconditional

[29] *People v. Eaton*, 184 Mich. App. 649, 658 (1992).

[30] *People v Vonins (After Remand)*, 203 Mich. App. 173 (1994).

guilty plea, the claim of ineffective assistance of counsel relating to those actions is also waived."[31] This makes sense.[32]

It is true that defendant is entitled to the effective assistance of counsel during the plea-negotiation process.[33] But it is equally true that "strict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney made at the plea bargain stage," for failing to do so can create problems:

> - First, the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real. The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions farther removed from immediate judicial supervision. There are, moreover, special difficulties in evaluating the basis for counsel's judgment: An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial.
>
> - Second, ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect. *Strickland* allows a defendant "to escape rules of waiver and forfeiture," . . . . Prosecutors must have assurance that a plea will not be undone years later because of infidelity to . . . the teachings of *Strickland*. The prospect that a plea deal will afterwards be unraveled when a court second-guesses counsel's decisions while failing to accord the latitude Strickland mandates . . . could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one.[34]

And as said in *McMann*, "a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel *may have misjudged* the admissibility

---

[31] *People v Vonins (After Remand)*, 203 Mich. App. at 175.

[32] And see *Ohio v. Wyley*, 2016 WL 1071430 (Ohio Ct. App., 3-17-2016).

[33] *Lafler v. Cooper*, 566 U.S. ——, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). And see *Hill v. Lockhart*, 474 U.S. 52, 106 S Ct 366 88 L.Ed.2d 203 (1985).

[34] *Premo v. Moore*, 562 U.S. 115, 125, 131 S. Ct. 733, 741-742, 178 L. Ed. 23 649 (2011).

of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession *erroneously thought admissible* in evidence depends as an initial matter, *not on whether a court would retrospectively consider counsel's advice to be right or wrong*, but on whether that advice was within the range of competence demanded of attorneys in criminal cases," "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts."[35]

2. Application

The present case is a good example, for defendant cannot show defective advice. A motion to dismiss on speedy trial grounds *was* made. Defendant does not discuss the merits of that motion. The docket entries reflect that the motion was made on 5-15-2013, and denied on 5-28-2013. Defendant had been charged in a not-in-custody complaint and warrant in July of 2012, taken into custody in Indiana in August of 2012, and it appears that he may have been arraigned on 9-10-2012, as he alleged in his motion to dismiss that at a pre-exam conference on that day he demanded a preliminary examination. It thus appears the motion was made some 247 or so days into the process. The motion itself was general and vague. It noted that on April 2, 2013, defendant's counsel withdrew, as defendant desired new counsel. Defendant's brief in support of his motion noted that the trial judge informed defendant that any delay from that point was occasioned by his request for and receipt of new counsel, and that defendant indicated he understood (see defendant's brief in support, p. 2). As to prejudice, defendant claimed only the fact of his incarceration during the period, and the speculation that the *prosecution* witnesses might have an impaired memory (see

[35] *McMann v. Richardson*, 90 S. Ct. at 1448-1449 (emphasis supplied).

defendant's brief in support, p. 6-7). There was no showing that any witness's memory had been impaired, and certainly nothing regarding any defense witness. On this motion it cannot be said that counsel was not functioning as the "counsel for the accused" in not advising defendant—assuming for the sake of argument that he did not—that this issue was rendered irrelevant by a plea, or not advising defendant to go to trial rather than plead because there was a substantial possibility of prevailing on appeal on this claim.[36] The *Strickland*/*McMann* standard cannot be met. Defendant's plea did not occur then for another 11 months after the denial of his motion. He pled without renewing the motion, and again, there is nothing that suggests any prejudice to his ability to defend the case, or that the prosecution did not have a strong case against him. Indeed, at sentencing he said "I regret this totally, and I apologize for wasting any time. . . . I would ask to be sentenced at the lowest end possible so I can move on to Indiana if possible."[37] There is no basis to say even in hindsight that counsel made a mistake, much less that he made one outside the range of competence of defense attorneys.

---

[36] See *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 656, 88 L.Ed.2d 640 (1986) (the "possibility of prejudice is not sufficient to support respondents' position that their speedy trial rights were violated. In this case, moreover, delay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry this burden"). It is the extreme case, not present here, where speculation might suffice. See the 8 ½ year delay in *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Note that in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) the delay was going on 5 years, and more than 4 were attributable to the prosecution's repeated failures to successfully conclude a prosecution against the codefendant, and no violation was found, largely because prejudice was minimal, and the record reflected that Barker did not want a speedy trial.

[37] Appendix, 39a. The trial judge noted that defendant had 15 prior felony convictions, and had a case since the charge in the present case. It appears that defendant has pled guilty a number of times previous to this case. See OTIS tracking system.

Even if the first-step—deficient performance—could be shown here, defendant must demonstrate in order to show prejudice that there is a reasonable probability that he would not have pleaded guilty had he been informed that his plea rendered a claim of a denial of speedy trial irrelevant to his judgment of guilt, and thus could not be pursued on appeal. Other than his self-serving claim, defendant advances nothing. A mere assertion that this fact was critical to the decision to plead is not itself sufficient; "[f]actors to be considered by the . . . court in determining whether a defendant would have decided not to plead guilty and insisted instead on going to trial include (a) whether the defendant pleaded guilty in spite of knowing that the advice on which he claims to have relied might be incorrect, (b) whether pleading guilty gained him a benefit in the form of more lenient sentencing, (c) whether the defendant advanced any basis for doubting the strength of the government's case against him, and (d) whether the government would have been free to prosecute the defendant on counts in addition to those on which he pleaded guilty."[38] Here, the prosecution amended the habitual notice from a habitual 4th to a habitual 2nd, changing defendant's maximum exposure *from life to 15 years.*

[38] *Chhabra v. United States*, 720 F.3d 395, 408-409 (CA 2, 2013). And see *United States v. Arteca*, supra. See also *United States v. Bejarano*, 751 F.3d 280 (CA 5, 2014); *Hodges v. Colson*, 727 F.3d 517, 539 (CA 6, 2013).

C. A defendant pleading guilty or nolo contendere need not be informed that the plea renders irrelevant all nonjurisdictional arguments concerning matters preceding the plea

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.[39]

Defendant argues that a guilty plea is involuntary if the defendant is not informed that the plea renders irrelevant—defendant says waives—all legal issues concerning matters preceding the plea that are not jurisdictional.[40] The People can find no case standing for that proposition, and defendant cites none. Defendant relies principally on *Padilla v. Kentucky*,[41] but as with death-penalty jurisprudence, where "death is different" and principles that apply to death-penalty cases do not apply elsewhere, so too with deportation. And *Padilla* did not find the plea involuntary, but counsel ineffective. The Supreme Court itself made it quite clear that deportation as a consequence

---

[39] *United States v Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 2087-2088, 60 L.Ed. 2d 634 (1979).

[40] "[C]ounsel failed to inform Mr. Horton that as a direct consequence of his unconditional plea, he would waive any speedy trial violates [sic] and not be able to raise those issues on appeal." Defendant's Brief, p. 13. There is no basis to distinguish a speedy trial claim from any other nonjurisdictional claim, such as that of illegally seized evidence or an involuntary confession, or even a double jeopardy claim that is not apparent on the face of the existing record. See *United States v. Broce*, supra (regarding the holding in *Menna* that a guilty plea does not waive a double jeopardy claim, "We added, however, an important qualification: 'We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that-*judged on its face*-the charge is one which the State may not constitutionally prosecute'" (emphasis added by the Court)).

[41] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

is different than others. The Court said that given modern immigration law "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[42] Indeed, the Court continued, "[w]e . . . have previously recognized that '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'"[43]

But here, why would a person who is pleading guilty—or nolo contendere—believe that though the plea is his or her "consent that judgment of conviction may be entered without a trial," antecedent matters in the process of the case *could* nonetheless be litigated on an appeal, unless the defendant was affirmatively misadvised? Even more than a trial, a plea is and should be the "main event," rather than a "tryout on the road" for the appeal[44]—unless the plea is a conditional one, reserving issues for appeal and so stated specifically on the record, with the consent of both parties. The United States Supreme Court in *Boykin v. Alabama*[45] set forth that which is necessary in terms of advice in order to render voluntary the waiver of rights that occurs by the defendant's consent to the entry of judgment, often known in Michigan as *Boykin/Jaworski* rights[46]: (1) the right to trial by jury, (2) the right to confront one's accusers, and (3) the privilege against self-incrimination. Amicus

---

[42] *Padilla v. Kentucky*, 130 S. Ct. at 1480.

[43] *Padilla v. Kentucky*, 130 S. Ct. at 1483.

[44] If "a trial on the merits, whether in a civil or criminal case, is the 'main event,' and not simply a 'tryout on the road' to appellate review," see *Freytag v. C.I.R.*, 501 U.S. 868, 895, 111 S. Ct. 2631, 2647, 115 L. Ed. 2d 764 (1991); *Wainwright v. Sykes,* 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977) , all the more so with a plea, where "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures."

[45] *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)

[46] *People v. Jaworski*, 387 Mich. 21 (1972).

finds no support for the proposition that a plea is not voluntary unless the defendant is advised that by pleading guilty or nolo contendere he or she is giving up the possibility of litigating antecedent legal issues in the case.

At least in the absence of affirmative misadvice by counsel that previously litigated—or unlitigated—issues survive the defendant's consent by plea to the entry of a criminal judgment against him or her, this Court should not "approve new grounds for setting aside guilty pleas."[47] If the Court chooses so to do, then MCR 6.302 should be amended forthwith to so include this advice in the advice of rights at the plea.

[47] *See United States v. Timmreck*, supra.

Relief

WHEREFORE, amicus requests that this Honorable Court affirm the Court of Appeals.

Respectfully submitted,

MICHAEL WENDLING
President
Prosecuting Attorneys Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research
Training and Appeals

/s/
TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney